

WARN Act Reminder

October 14, 2008

As Economic Woes Continue and Layoffs Become the Norm, Remember Your Obligations Under the Worker Adjustment and Retraining Notification Act (WARN)

It seems like the bad news just keeps coming from Main Street to Wall Street. Bank failures, last ditch congressional stimulus deals, mergers to save “blue chip” companies, stalled short term credit, etc. As business slows and companies continue to examine how best to survive in this fluid, volatile global economy, we all may see a significant up-tick in layoffs. Because of this, all employers should keep the requirements of the WARN Act in mind if layoffs are on the horizon.

The WARN Act offers protection to workers by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. This notice must be provided to workers implicated in such job losses or their union (if they are so represented). Notices must also be sent to the State dislocated worker unit and to the appropriate unit of local government (*i.e.*, mayor, county manager, etc.).

Coverage-

Employers are generally covered by WARN if they have 100 or more employees (not including employees who have worked less than 6 months in the last 12 months and not including employees who work an average of less than 20 hours a week). The kinds of employers that are covered generally include (i) private, for-profit employers, (ii) private, nonprofit employers, and (iii) public and quasi-public entities which operate in a commercial context and are separately organized from regular government. Not covered are regular federal, state, and local government entities.

Hourly, salaried, managerial, and supervisory employees are all entitled to WARN notice.

WARN Notice Triggers-

Plant Closings: A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an “employment loss” (see below) for 50 or more employees during any 30-day period.

Mass Layoffs: A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce.

These employee calculations do not include employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week.

Also, an employer must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the plant closing/mass layoff thresholds, during any 90-day period. Job losses within any 90-day period will count together, unless the employer demonstrates that the employment losses during the 90-day period are the result of distinct actions and causes.

Business Sales-

In situations involving the sale of part or all of a business, which may be prevalent in coming months, be mindful of the following:

- *If a sale by a covered employer results in a covered plant closing or mass layoff, the 60 day notice is required;*
- *The seller is responsible for providing notice of any covered plant closing or mass layoff occurring up to and including the time of sale;*
- *The buyer is responsible for providing notice of any covered plant closing or mass layoff occurring after the time of sale;*
- *No notice is required if the sale does not result in a covered plant closing or mass layoff;*
- *Employees of the seller (but not employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week) at the time of sale become, for purposes of WARN, employees of the buyer.*

What is an Employment Loss?-

- *An employment termination, other than a discharge for cause, voluntary departure, or retirement;*
- *A layoff exceeding 6 months; or*
- *A reduction in an employee's hours of work of more than 50% in each month of any 6-month period.*

What is NOT an Employment Loss?-

- *Refusing a transfer to a different employment site within a reasonable commuting distance.*
- *Accepting a transfer outside reasonable commuting distance within the later of 30 days after the transfer is offered or within 30 days after the plant closing or mass layoff.*

Exemptions-

- *Temporary Work: Notice is not required if a plant closing is the closing of a temporary facility, or if the completion of a specific project gives rise to the closing/mass layoff. There must, however, be an understanding by the affected employees that their employment was limited to the duration of the facility or project.*
- *Labor Disputes: Employers need not to provide notice to strikers or to workers who are part of the bargaining unit involved in labor negotiations that led to a lockout when the strike/lockout is equivalent to a plant closing or mass layoff. Notices to non-striking, non-bargaining unit employees who experience an employment loss as a direct or indirect result of a strike are still entitled to notice.*

- *Permanent Replacement: Employer need not give notice when permanently replacing “economic strike” as that term is defined under the National Labor Relations Act.*

Notice-

The employer must give written notice to the chief elected officer of the union representing the affected employees and to unrepresented employees who may reasonably expect to experience an employment loss. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are entitled to notice, even though they are not counted when determining the trigger levels.

Notice is also required to the state dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located (the mayor, etc.).

Notification Period-

Generally, notice must be timed to reach the required parties at least 60 days before a plant closing or mass layoff. The exceptions to 60-day notice are:

- *Faltering company: This narrow exception applies only to plant closings and covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business.*
- *Unforeseeable business circumstances: This arises where the closing or layoff is caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.*
- *Natural disaster: This arises where a closing or layoff is the direct result of a natural disaster – flood, earthquake, drought, storm, etc.*

Even if the employer relies on one of these exceptions, it still must give as much notice as practicable and include a statement of the reason for reducing the notice period.

Penalties-

Employers violating the WARN Act by closing a plant or conducting a mass layoff without providing appropriate notice is liable to each affected employee for an amount including back pay and benefits for the period of the violation – up to 60 days. Failure to provide notices to units of local government may give rise to a civil penalty not to exceed \$500 for each day of violation.

The foregoing provides a general sketch of WARN’s requirements. If you find yourself in a situation that may trigger the WARN Act, you should contact legal counsel immediately to fully understand the nuances of this and other laws (OWBPA, ADEA, Title VII, etc.) that are implicated in legally downsizing your company.